

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

COREY BURRELL BROWN, #649267

VS.

DIRECTOR, TDCJ-CID

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CIVIL ACTION NO. 4:16cv934

ORDER OF DISMISSAL

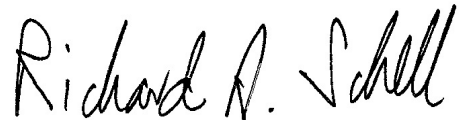
The above-entitled and numbered civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson. The Report and Recommendation of the Magistrate Judge (Dkt. #12), which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Petitioner made timely objections to the Report and Recommendation (Dkt. #14). In his objections, Petitioner argues: (1) the court should not have construed his filing as a § 2254 petition because he intended it to be filed as a § 2241 petition; (2) he is not challenging the constitutionality of his conviction; and (3) the second and successive limitation should not have been applied to Petitioner's filing because he claims he is actually innocent of the crime. *See* Dkt. #14 at 2-3.

Petitioner's objections lack merit. As an initial matter, the filing was properly construed as a § 2254 petition. A § 2241 petition attacks the manner in which a sentence is executed, and not the constitutionality of the confinement. *See Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001). In Petitioner's filing, Petitioner argues that he is "challenging the illegal custody of which he is being held in violation of the constitution and laws of the United States [because] . . . Petitioner is actually innocent of the charges for which he is in custody. *See* Dkt. #1 at 2. Thus, Petitioner is challenging the constitutionality of his confinement, and the filing was properly construed as a §2254 petition. Finally, actual innocence is a gateway through a procedural bar for

an initial filing of a § 2254 petition, but not for a second or successive filing. *See In re Warren*, 537 Fed. Appx. 457, 458 (5th Cir. 2013). Having made a *de novo* review of the objections, the court concludes the findings and conclusions of the Magistrate Judge are correct, and that Petitioner's objections are without merit.

It is therefore **ORDERED** the petition for habeas corpus is **DISMISSED** without prejudice (Dkt. #1). All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this the 19th day of June, 2018.

A handwritten signature in black ink, reading "Richard A. Schell". The signature is written in a cursive, flowing style. The first name "Richard" is written with a large, prominent "R". The middle initial "A." is written in a smaller, more compact script. The last name "Schell" is written with a large, prominent "S" and a long, sweeping tail that extends to the right.

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE